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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/014,076	01/27/1998	MAX A. FEDOR	D-1056 DIV3	4092
28995	7590	05/03/2006	EXAMINER	
RALPH E. JOCKE walker & jocke LPA 231 SOUTH BROADWAY MEDINA, OH 44256			BUTLER, MICHAEL E	
			ART UNIT	PAPER NUMBER
			3653	

DATE MAILED: 05/03/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action**  
**After the Filing of an Appeal Brief**

Application No.

09/014,076

Examiner

Michael Butler

Applicant(s)

FEDOR ET AL.

Art Unit

3653

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

The reply filed 17 January 2006 is acknowledged.

1. ☐ The reply filed on or after the date of filing of an appeal brief, but prior to a final decision by the Board of Patent Appeals and Interferences, will not be entered because:

a. ☐ The amendment is not limited to canceling claims (where the cancellation does not affect the scope of any other pending claims) or rewriting dependent claims into independent form (no limitation of a dependent claim can be excluded in rewriting that claim). See 37 CFR 41.33(b) and (c).

b. ☐ The affidavit or other evidence is not timely filed before the filing of an appeal brief.  
See 37 CFR 41.33(d)(2).

2. ☐ The reply is not entered because it was not filed within the two month time period set forth in 37 CFR 41.39(b), 41.50(a)(2), or 41.50(b) (whichever is appropriate). Extensions of time under 37 CFR 1.136(a) are not available.

Note: This paragraph is for a reply filed in response to one of the following: (a) an examiner's answer that includes a new ground of rejection (37 CFR 41.39(a)(2)); (b) a supplemental examiner's answer written in response to a remand by the Board of Patent Appeals and Interferences for further consideration of rejection (37 CFR 41.50(a)(2)); or (c) a Board of Patent Appeals and Interferences decision that includes a new ground of rejection (37 CFR 41.50(b)).

3. ☐ The reply is entered. An explanation of the status of the claims after entry is below or attached.

4. ☒ Other: Applicant's reply is non-responsive to the 105 requirement.

The Board has raised the red flag of a possible defect in applicant's declaration or affidavit. Applicant has substantially reiterated an explanation presented by the examiner to the Board after the first remand. That explanation detailing why the documents were not inconsistent per se did not satisfy the Board. While it is certainly plausible that the other remaining inventors on the declaration are the inventors of the remaining claims and hence would refute there being an inconsistency in the documents, it is also possible that an inventor may have been omitted or improperly included on these documents. It is necessary to see the identity of the remaining inventors to definitively evaluate that issue.

As the examiner lacks the same level of omniscience as the Board, and there may have surfaced contrary evidence which the Board may possess from other cases that is relevant to the issue presented. Such evidence may be adverse to applicant's documents, so there is a need to evaluate those documents in question subsequent to the examiner's earlier evaluation.

While applicant has properly pointed out the examiner previously evaluated the affidavit, in view of the suspicions raised by the Board, it is necessary to scrutinize the declaration and affidavit further in view of the red flag raised by the Board.

In order to properly evaluate whether the Board's suspicion of such a defect is fatal to either document, it is necessary to find the identity of the inventor of each claim.

If applicant has not submitted a proper declaration, applicant should execute a new declaration. If the proper inventorship does not support applicant's priority chain, applicant should amend his priority claim. If applicant has omitted an inventor from his affidavit or included an incorrect inventor on his affidavit, he should withdraw the current affidavit.

*Michael E. Butler*

*Gene O. Crawford*  
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